

### **Remarks**

Claims 1-45 are pending. Entry of the amendment is respectfully requested. No new matter has been added. Reconsideration is respectfully requested.

### **Application Status**

The BPAI decision dated September 19, 2007 clearly states that it is a *deferred* decision. That is, the decision is not final for judicial review. Note the decision at page 16. Appellants still have a right to request a rehearing once the decision is made final. Appellants also maintain their right to appeal the decision after it is made final. As shown in more detail below, the Examiner confuses a deferred decision with a final decision.

### **The requirements of the Remand**

The decision includes a straightforward Remand to the Examiner. The Remand simply requires that the Examiner readdress whether the subject matter of claims 10-22, 26-27, 29-33, and 40-41 would have been obvious. Only two options constitute a proper reply to the Remand. The Examiner can either (1) notify the BPAI that the subject matter of said claims would not have been obvious; or (2) reopen prosecution. As the Examiner has done neither, the Examiner's response is defective and the requirements set forth in the Remand are still pending.

### **The record shows that all claims were already fully considered in view of Kraft and Liff**

Both Kraft and Liff were applied in the Office Action dated December 18, 2002. Claims 15-22 were even rejected under 35 U.S.C. § 103(a) as being unpatentable over Kraft in view of Liff. This rejection was later reconsidered and withdrawn by the Examiner following appeal. As this issue was already (twice) fully considered on the record by the Examiner, Appellants respectfully submit that the Remand with respect to claims 15-22 is moot.

Additionally, reintroduction of a previously withdrawn rejection on the same non amended claims would constitute a *prima facie* admission by the Examiner of a clear error in examination. Should such an admission occur, then Appellants will request a full refund of all fees needlessly paid as a result of the clear error.

### **Request for Reconsideration**

The Action indicates that the Examiner relies on MPEP § 1214.06. The Action even uses form paragraph 12.119.01, which can be found in said MPEP section. However, the Examiner has no authority to use said form paragraph at this stage of prosecution. Said form paragraph is only usable after "expiration of the period for further appeal" (i.e., after "expiration of the time for filing court action"). Note MPEP § 1214.06 (I) and (I)(B). Thus, the Action is unclear and defective. Reconsideration thereof is respectfully requested.

### **The Examiners actions constitute clear error**

Appellants take exception to the Examiner (in the Action) threatening to abandon the application if certain dependent claims are not now placed into independent form. The Examiner has no authority whatsoever to require needless filing of extra independent claims (and fees associated therewith), especially when the Examiner knowingly plans to reject said extra independent claims (Action at page 3). The acts that the Examiner is trying to carry out appear to be in clear violation of the Rules and the Administrative Procedures Act.

For the numerous reasons discussed herein, Appellants respectfully request that this application be transferred to a primary examiner.

### **Conclusion**

The undersigned is willing to discuss any aspect of the Application.

Respectfully submitted,



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Ralph E. Jocke      Reg. No. 31,029

WALKER & JOCKE

231 South Broadway

Medina, Ohio 44256

(330) 721-0000